

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

FILED

FEB 27 2007

ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY SS DEPUTY

MADYUN ABDULHASEEB,

Plaintiff,

vs.

SAM CALBONE et al.,

Defendants.

No. CIV-05-1211-W

ORDER

On January 29, 2007, United States Magistrate Judge Doyle W. Argo issued a Report and Recommendation in this matter and addressed the effect the United States Supreme Court's decision in Jones v. Bock, 2007 WL 135890 (January 22, 2007),¹ had on the Motions to Dismiss filed by the various defendants in this case. The Supreme Court in Jones had rejected the doctrine of total exhaustion under title 42, section 1997e of the United States Code and in light of that decision, Magistrate Judge Argo determined that the defendants' motions, which had sought dismissal based upon that doctrine, should be denied.

The parties were advised of their right to object to the Report and Recommendation, and the matter now comes before the Court on the objections of plaintiff Madyun Abdulhaseeb and defendants Debbie L. Morton, Richard Kirby, Ron Anderson, G.

¹The Supreme Court in Jones abrogated the decision by the United States Court of Appeals for the Tenth Circuit in Steele v. Federal Bureau of Prisons, 355 F.3d 1204 (10th Cir. 2003), and its requirement that the plaintiff must specially plead or demonstrate exhaustion in his complaint.

The Supreme Court also in Jones abrogated the Tenth Circuit's decision in Ross v. County of Bernalillo, 365 F.3d 1181 (10th Cir. 2004), and its requirement that the district court dismiss an action in its entirety if a plaintiff had asserted both exhausted and unexhausted claims in his complaint.

Franzese, Melinda Guilfoyle, Kameron Harvanek, Sam Calbone, Ken Wood, Lt. Barger, Travis Smith, J. Haskins, VanWey, Elizondo, Branam, Major DeVaughn, Lt. Beasley, Z. Jacques, Dishman, Carl Mock and Cheesie Cartwright.²

Upon de novo review of the record and acknowledging that some duplication of effort and resources will result, the Court under the circumstances of this case concurs with Magistrate Judge Argo's suggested disposition of the pending Motions to Dismiss and his recommendation that said motions be denied without prejudice to the defendants' right to assert failure to exhaust as an affirmative defense in accordance with Jones. The Court likewise concurs with Magistrate Judge Argo's recommendation that the plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction be denied.

Accordingly, the Court

(1) ADOPTS the Report and Recommendation issued on January 29, 2007;

(2) DENIES the Motion to Dismiss [Doc. 77] filed on July 21, 2006, by defendants Guilfoyle, Morton, Kirby, Anderson, Franzese and Harvanek;

(3) DENIES the Motion to Dismiss [Doc. 81] filed on July 25, 2006, by defendants Mullin and Ward;

(4) DENIES the Motion to Dismiss [Doc. 85] filed on July 26, 2006, by defendants Calbone, VanWey, Wood, Branam, Elizondo, Beasley, Jacques, DeVaughn, Haskins, Smith, Barger and Dishman;

(5) DENIES the request for dismissal [Doc. 96] filed by defendants Mock and

²On February 20, 2007, defendants Mock and Cartwright filed a Notice of Joinder in Objection wherein they adopted and incorporated by reference the arguments and authorities advanced by and relied upon by their co-defendants. In filing the Notice of Joinder, Mock and Cartwright entitled their document "Motion for Joinder" [Doc. 112] on the docket sheet and to the extent necessary, the Court grants said motion and permits Mock and Cartwright to join in the pending Motions to Dismiss.


Cartwright to the extent they adopted and joined in the Motions to Dismiss filed by the co-defendants;

(6) ORDERS that the denial of the defendants' Motions to Dismiss be without prejudice to the defendants' right to assert failure to exhaust as an affirmative defense in accordance with the Supreme Court's decision in Jones;

(7) DENIES Abdulhaseeb's Motion for a Temporary Restraining Order and a Preliminary Injunction [Doc. 89] file-stamped August 9, 2006; and

(8) RE-REFERS this matter to Magistrate Judge Argo for further proceedings.

ENTERED this 27th day of February, 2007.


LEE R. WEST
UNITED STATES DISTRICT JUDGE